

APPENDIX

Opinion of Special Term

By STODDART, J.

Dated January 20, 1942

Motion for summary judgment. The plaintiff sues as the assignee of one George Ferguson, who, it is claimed, was employed by the defendant to effect the sale of a vessel to Lloyd Brasileiro, a Department of the Republic of Brazil. Ferguson's commission was to be paid "If and when the sale is effected, approval of the Maritime Commission obtained, full payment is made to us and title transferred to your buyers, then you will be paid a commission of 5% of the purchase price. Otherwise there is no obligation on our part." Although none of these events precedent to Ferguson's right to compensation happened, it is claimed that it was the defendant's own wilful default which prevented their occurrence.

The papers reveal that on the 24th day of October, 1940, an agreement to sell the vessel was signed by the defendant. Delivery of the vessel was to be made on or before December 16th, 1940. However, it was provided by paragraph 10 of the agreement that "*This agreement and the sale of the vessel are subject in all respects to the condition that the United States Maritime Commission shall approve the sale of the vessel to the Buyer and her transfer to Brazilian registry on or before the date of delivery of the vessel * * ** The Seller shall promptly apply for such approval by the United States Maritime Commission and use all diligence to obtain same. * * *" (Italics mine.)

After having been approved as to form by the prospective purchaser, a written application was submitted

Appendix.

by the defendant to the Maritime Commission on October 24, 1940. On December 6, 1940, the Commission denied the application. The defendant notified the purchaser of the disapproval and on December 9th returned the sum of \$100,000 which had been delivered upon execution to the contract. On December 14th an assignment was made by the purchaser to the Moore-McCormack Lines Inc., which was ready, willing and able to comply with the terms of the contract on December 16th, the date of delivery of the vessel.

The defendant's argument on this motion is that there was no contract without the Commission's approval and if there was no contract that there could be no assignment. With this contention, I agree. By Section 808, Title 46, of the U. S. Code Annotated, it is provided, in part:

“* * * it shall be unlawful without the approval of the United States Maritime Commission, to sell * * * or agree to sell * * * to any person not a citizen of the United States * * * any vessel * * * owned in whole or in part by a citizen of the United States * * *.”

Violations, according to that Section, will result not alone in the forfeiture of the vessel but in punishment of the violator by the imposition of a fine of \$5,000, imprisonment of not more than five years, or both.

The parties to the contemplated sale in this case apparently recognized Section 808 by conditioning their agreement upon the Commission's approval. Had they not done so, the agreement would have been void and unenforceable. Nevertheless, for it is well settled that a contract or sale directly prohibited by statute is void. (*Sturm v. Truby*, 245 App. Div. 357); *Restatement of the Law of Contracts*, Section 580; *Williston on Contracts*,

Appendix.

Revised Edition, Section 1763. But, having expressly agreed to the condition, the conclusion that the contract was ineffective is strengthened and reinforced, for a precedent condition must be performed or happen before a duty of performance arises or before the agreement of the parties in this case became a valid and binding contract. (See Williston on Contracts, Revised Edition, Section 666-A.) "Non-performance of a condition precedent must * * * annul the contract in toto * * * (Del Monte Dress Co., Inc. v. Royal Indemnity Co., 154 Misc. 751). After the defendant's application for approval was denied, it was under no obligation to apply again. It rightfully treated the contract as non-existent and returned the down payment. Ferguson, therefore, had not earned any commission.

Accordingly, the plaintiff's motion is denied. In the absence of a cross-motion, the court may not dismiss the complaint at this time. (Lang v. Dryer, 170 Misc. 207.)

Submit order on notice.

Dissenting Opinion of Mr. Justice (now Presiding Justice) Close of the Appellate Division

The contract was assigned prior to the law day to a purchaser to whom the condition precedent had no application.

Shipping Act (Title 46, U. S. C.)

Section 808. Registration, enrollment, and licensing of vessels purchased, chartered, or leased; regulations; coast-wise trade.

* * * * *

Appendix.

Except as provided in section 1181 of this title, it shall be unlawful, without the approval of the United States Maritime Commission, to sell, mortgage, lease, charter, deliver, or in any manner, transfer, or agree to sell, mortgage, lease, charter, deliver, or in any manner transfer, to any person not a citizen of the United States, or transfer or place under foreign registry or flag, any vessel or any interest therein owned in whole or in part by a citizen of the United States and documented under the laws of the United States, or the last documentation of which was under the laws of the United States.

Any such vessel, or any interest therein, chartered, sold, transferred, or mortgaged to a person not a citizen of the United States or placed under a foreign registry or flag, or operated, in violation of any provision of this section shall be forfeited to the United States, and whoever violates any provision of this section shall be guilty of a misdemeanor and subject to a fine of not more than \$5,000, or to imprisonment for not more than five years, or both. (As amended Ex. Ord. No. 6166, Section 12, June 10, 1933; June 29, 1936; c. 858, Sections 204, 904, 49 Stat. 1987, 2016; June 23, 1938, c. 600, section 42, 52 Stat. 964.)

Section 824. Reversal, suspension, or modification or orders. The board may reverse, suspend, or modify, upon such notice and in such manner as it deems proper, any order may by it. Upon application of any party to a decision or order it may grant a rehearing of the same or any matter determined therein, but no such application for or allowance of a rehearing shall, except by special order of the board, operate as a stay of such order. (Sept. 7, 1916, c. 451, Section 25, 39 Stat. 736.)